# Alexander John Shek Kwok Bun v Ketua Pengarah Lembaga Hasil Dalam Negeri, Malaysia

HIGH COURT (KUCHING) — ORIGINATING MOTION NO 25–11 OF 2004–II
LAU BEE LAN JC
16 AUGUST 2004

*Revenue Law — Income tax — Recovery by government of taxes due and payable — Restriction from leaving country — Application to remove restrcition — Whether to be granted — Whether court seized with jurisdiction to grant application — Income Tax Act 1967 ss 103, 106(3)*

The respondent had imposed a bar upon the applicant, pursuant to s 104(1) Income Tax Act 1967 ('the Act'), which restricted him from leaving the country on the premise that the applicant failed to settle his taxes. The applicant applied to this court to lift the said restriction.

**Held**, dismissing the application with costs:

(1) Section 104 of the Act is a mode authorised under the Income Tax Act for recovery of a tax payable under s 103. Applying the *ratio decidendi* of *Sun Man Tobacco*'s case, this court has no power to entertain his plea by reason of s 106(3) of the Act, even if the applicant did appeal under s 99 of the Act (see paras 8 and 13).

[**Bahasa Malaysia summary**

Responden telah mengenakan suatu penghalang terhadap pemohon di bawah s 104(1) Akta Cukai Pendapatan 1967 ('Akta'), yang menghalangnya daripada meninggalkan negara atas alasan pemohon gagal menyelesaikan cukainya. Pemohon memohon ke mahkamah ini untuk mengetepikan halangan tersebut.

**Diputuskan**, menolak permohonan dengan kos:

(1) Seksyen 104 Akta merupakan suatu kaedah yang dikuatkuasakan di bawah Akta Cukai Pendapatan untuk mendapatkan semula cukai yang perlu dibayar di bawah s 103. Memakai alasan penghakiman dalam kes *Sun Man Tobacco*, mahkamah ini tidak mempunyai bidang kuasa untuk mempertimbangkan permohonannya di bawah s 106(3) Akta, walaupun pemohon membuat rayuan di bawah s 99 Akta (lihat perenggan 8 dan 13).

**Notes**

For cases on recoveries by government of taxes due and payable, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) para 2131

**Cases referred to**

*Chong Woo Yit v Government of Malaysia* [1989] 1 CLJ (Rep) 9 (refd)
*Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 (folld)
*Tai Choi Yu v The Government of Malaysia & 2 Ors* [1994] 1 CLJ 174 (refd)

**Legislation referred to**

Income Tax Act 1967, ss 99, 103, 104, (1), (4), (5A), 106(3)
Rules of the High Court 1980, O 26A

*Fabian Sigar (John Shek, Sigar, Wei Yee & Co)* for the applicant
*Norhisham b Ahmad(Inland Revenue Board)* for the respondent

**Lau Bee Lan JC**:

**[1]** Vide a notice of motion dated 13 May 2004 (encl 2), the applicant applied for leave of the court to lift the 'ban' so that he could leave the country for 1½ months for medical check-up to Australia.

**[2]** The 'ban' averred to by the applicant is in fact the restriction imposed on the applicant vide a certificate dated 26 April 99 issued by the Director General of Lembaga Hasil Dalam Negeri (LHDN) pursuant to s 104(1) of the Income Tax Act 1967 (hereinafter referred to as 'the s 104 certificate') to prevent the applicant from leaving the country unless the applicant pays the tax as per the certificate namely, RM75,756.11 (hereinafter referred to as 'the impugned sum').

**[3]** From the affidavit in support of the applicant annexed to the application, the grounds he relied upon in support of his application are primarily:

(a) he denies receipt of any brokerage fee for the sum of RM100,000 from a company WAB Keluarga Realty Sdn Bhd upon which the taxable sum of RM75,000 was based upon and which formed the subject matter of a suit instituted by the respondent against him namely, sessions court summons No 51–10–99–11;

(b) he has no knowledge of the 'ban' until he received a letter from the LHDN dated 26 April 1999 (Exh AJSKB2);

(c) he has no knowledge that LHDN had taxed him the impugned sum, otherwise he would have appealed;

(d) he denies owing LDHN the impugned sum and the ban was 'unconscionable and unjustifiable' in the eyes of the law under s 104 of the Income Tax Act;

(e) LDHN did not conduct proper investigation before computing that owed LDHN the impugned sum.

(f) he had instituted action against WAB Keluarga Realty Sdn Bhd *vide* summons No 52–756–99–II for defamation and general damages for the wrongful act of the clerk to include the sum which he did not receive and this matter was still pending;

(g) he expressed dissatisfaction at the reply of the respondent dated 12 April 2004 (Exh AJSKB 12) which stated that the revocation of the travel restriction or 'ban' could be lifted only upon full payment of the impugned sum or where full payment could not be effected or for purposes of the request to leave the country for medical reasons as was the case here, he had to liaise with the 'Pengarah Bahagian Operasi, Lembaga Hasil Dalam Negeri Malaysia';

(h) failure of LDHN to respond to his letter dated 14 April 2004 addressed to the Pengarah Bahagian Operasi, LDHN for permission to travel; and

(i) he had no intention of absconding and the fact that he was a person of means and has an active legal practice.

**[4]** Vide the affidavit in reply of Monica Sanyaw affirmed on 9 June 2004 (encl 7), the respondent opposed the application basically on the grounds as follows:

(i) the sessions court summons No 51–10–99–11 has been disposed off by the High Court's decision made on 4 December 2001 wherein the applicant's appeal was dismissed and the respondent's cross-appeal was allowed;

(ii) issuance of the s 104 certificate;

(iii) there was no appeal made to the Special Commissioners of Income Tax pursuant to s 99 of the Income Tax Act;

(iv) the respondent denies the applicant did not have knowledge about the payment of the impugned sum as a letter dated 9 August 1999, exh Ml had been sent to him;

(v) the respondent denies the applicant did not have knowledge of the s 104 certificate as it was sent to the applicant's residential address; and

(vi) the s 104 certificate could not be lifted unless the applicant satisfied the conditions under s 104(4) of the Income Tax Act ie effect full payment of the impugned sum or furnished security to the satisfaction of the Director-General of LHDN for such payment.

**[5]** Although, the applicant has alleged of the matters stated in (d) and (e) above which to reiterate is in respect of the ban made pursuant to s 104 of the Income Tax Act being 'unconscionable and unjustifiable' and that no proper investigations were conducted, Mr Fabian Sigar, counsel for the applicant had confirmed to the court that the applicant was not challenging s 104 of the Income Tax Act. Thus, the core of the applicant's grievance which formed the basis of his application to the court is that the appeal to the Court of Appeal in respect of the impugned sum was still pending and which essentially stems from his contention that he did not owe the respondent the impugned sum as alleged. Of course, the respondent contends otherwise and urged the court not to lift the 'ban' because of the s 104 certificate.

**[6]** Mr Norhisham bin Ahmad, legal officer of LDHN had submitted that the case of *Tai Choi Yu v The Government of Malaysia & 2 Ors* [1994] 1 CLJ 174 applied, quoting an extract of the judgment at p 178 parase–f as follows:

> One of the primary functions of the DGIR under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorised in Part VII (ss 103 to 111) of the Act. Action under s 104 is one of the authorised modes. It is the requirement of s 103 of the Act that a person pays his assessed tax on the service of the notice of assessment on him failing which the DGIR may besides using all other authorised modes, proceed to recover in Court

the assessed tax as a debt due to the Government, and if judgment is obtained, to execute the judgment.

**[7]** The respondent counsel submitted that *Tai Choi Yu*'s case (*supra*) could be distinguished on the ground that in that case the evidence showed that between June 1988 to April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax, whereas in the instant case, this was the first time that the applicant was applying to leave the country for medical check-up.

**[8]** I do agree that *Tai Choi Yu*'s case is applicable in the context of the present case to the extent that the *dictum* of his lordship, Mohd Eusoff bin Chin SCJ (as he then was) as quoted above explains the rationale that s 104 of the Income Tax Act is a mode authorised under the Income Tax Act for recovery of a tax payable under s 103. The nature of the respondent's claim is that the applicant is truly and justly indebted to the respondent in the sum of RM76,095.15 being tax due for year of assessment 1986 (additional) and 1997 including the 10% and 5% increases levied under s 103(4) and 103(5A) of the Income Tax Act (see p 12, lines 10–15 of the ruling of the learned sessions court judge in respect of the O 26A application contained in the respondent's bundle of documents dated 8 July 2004 (encl 11)).

**[9]** Mr Norhisham also cited the case of *Chong Woo Yit v Government of Malaysia* [1989] 1 CLJ (Rep) 9 submitting that the Supreme Court therein held:

> On service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government (Headnote 2); and
>
> On such civil proceedings being brought by the Government, the Court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased (Headnote 3).

**[10]** The same legal proposition (Headnote 3 above) was echoed in the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 which was also referred to by the respondent. This case involved an appeal against the judgment of the High Court at Ipoh giving leave to the plaintiff, Government of Malaysia, to sign final judgment against the defendant company, for the sum of RM1,320,440.15, alleged to be additional income tax and increases on that additional income tax imposed under the law against the defendant company for the years of assessment 1960 to 1971. One of the contentions of the appellant was that s 106(3) of the Income Tax Act did not apply because no tax whatever was due by him to the plaintiff.

**[11]** However, it was noted by His Lordship Azmi LP (as he then was) that the same learned trial judge in another civil suit by the Government against a taxpayer (Civil Suit No 95 of 1971 at Ipoh) took a different stand and gave leave to the taxpayer to defend the case basically on the ground

that s 106(3) of the Income Tax Act would not apply to cases where the contention is that no tax at all is due. His Lordship made this deduction based on the passage of the trial judge's judgment which His Lordship quoted at p 164 para I (left hand column) until para F (right hand column). His Lordship opined that he regretfully could not agree with such a contention and further expressed:

> In my opinion the learned judge was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5) he has to do so by way of appeal to the Special Commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any disputes on questions of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated.

**[12]** In agreeing with the views expressed by His Lordship Azmi LP (as he then was) in dismissing the appeal, Gill FCJ (as he then was) at p 165 (left hand column) had opined:

> In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a tax-payer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

**[13]** Similarly in the present case, the applicant has argued that he did not owe the impugned sum to the respondent. Hence, applying the *ratio decidendi* of *Sun Man Tobacco*'s case, this court has no power to entertain his plea by reason of s 106(3) of the Income Tax Act. In this instant case it was submitted by the respondent that the applicant did not appeal under s 99 of the Income Tax Act. In my view, even if he did, this court is again precluded from entertaining his plea for the same reason as stated.

**[14]** For the foregoing reasons, I dismiss the application of the applicant with costs to be taxed unless otherwise agreed.

*Application dismissed with costs.*

Reported by M Maheswaran